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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-476

ARLAM CARR, JR., ET AL

AND

PENELOPE ANNE JENKINS, ET AL

PETITIONERS,

VS.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

VAUGHAN HILL ROBISON
P. O. Drawer 1470
815-830 Bell Building
Montgomery, Alabama 36102

JOSEPH D. PHELPS
P. O. Drawer 1470
815-830 Bell Building
Montgomery, Alabama 36102

TABLE OF CONTENTS

	Page
Table of Authorities	i
Questions Presented	1
The Montgomery County School System	2
Statement of the Case	12
Reasons for Disallowance of Writ	34
Conclusion	49
Appendix A	50
Appendix B	53

TABLE OF CASES

	Page
Arvizu v. Waco Independent School District, 495 F. 2d 499 (5 Cir. 1974)	44
Brown v. Board of Education, 347, U. S. 483, 98 L. Ed 873, 74 S. Ct. 686, 38 ALR 2d 1180 (1954)	34, 38
Brown v. Board of Education, 349 U. S. 294, 99 L. Ed 1083, 75 S. Ct. 753 (1955)	34, 48
Carr v. Montgomery County Board of Education, 429 F. 2d 382 (5 Cir. 1970)	9, 12, 13, 47
Carr v. Montgomery County Board of Education, 511 F. 2d 1374 (5 Cir. 1970)	12, 16, 42
Carr v. Montgomery County Board of Education, 377 F. Supp. 1123	11, 12, 13, 16, 19, 21, 22, 23, 25, 26, 27, 30, 36, 37, 40

Cooper v. Aaron, 358 U. S. 1 (1958) 48

Davis v. Board of School Commissioners, Mobile County, 402 U. S. 33 (1971), 28 L. Ed 2d 577, 91 S. Ct. 1289 ..... 34, 38, 45

Ellis v. Board of Instruction of Orange County, 465 F. 2d 878, (5 Cir. 1972) 44

Green v. County School Board of New Kent County, 391 U. S. 430, 20 L. Ed 2d 716, 88 S. Ct. 1689 ..... 34, 38, 41, 42, 45

Keyes v. School District No. 1, 413 U. S. 189, 37 L. Ed 2d 548, 93 S. Ct. 2686 41

Lee v. City of Troy Board of Education, 432 F. 2d 819 (5 Cir. 1970) 41, 46

Milliken v. Bradley, 418 U. S. 717, 41 L. Ed 2d 1069, 94 S. Ct. 3112 ..... 40, 43

Northcross v. Board of Education of Memphis, 489 F. 2d 15 (6 Cir. 1973) Cert. denied 416 U. S. 962, 40 L. Ed 2d 313, 94 S. Ct. 1982. (1974) 41, 46

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 28 L. Ed 2d 554, 91 S. Ct. 1267 (1971) 15, 34, 35, 38, 39, 41, 45

Thompson v. School Board of the City of Newport News, Virginia, 465 F. 2d 83 (4 Cir. 1972) 45

United States v. Montgomery County Board of Education, 395 U. S. 225, at 236, (1969), 23 L. Ed 2d 263, 89 S. Ct. 1670 ..... 9, 35

United States v. Board of School Commissioners, 483 F. 2d 1406 (7 Cir. 1973) 48

Winston-Salem Forsyth County Board of Education v. Slott, 404 U. S. 121, 31 L. Ed 2d 441, 92 S. Ct. 1236 39

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QUESTIONS PRESENTED

In the "Questions Presented" portion of their brief the petitioners misstate and give an incomplete account of the factual finding concurred in by the two courts below. The petitioners thereby fail to present the applicable constitutional questions in the factual context of this case. When the actual factual findings of the District Court, as affirmed by the Court of Appeals, are considered, the real questions presented are as follows:

1. DID THE COURTS BELOW ERR IN THEIR APPROVAL OF A SCHOOL DESEGREGATION PLAN WHICH INCLUDES SOME

SUBSTANTIALLY PREDOMINANTLY BLACK SCHOOLS UPON THE EXPRESS FACTUAL FINDING BY THE DISTRICT COURT, CONCURRED IN BY THE COURT OF APPEALS, THAT: "IN EACH INSTANCE THIS COURT HAS EXAMINED AND REEXAMINED THE EVIDENCE AND HAS DETERMINED THAT THESE PREDOMINANTLY BLACK SCHOOLS EXIST AND CONTINUE TO EXIST WITHOUT ANY DISCRIMINATORY BOARD ACTION" 377 F. Supp. at 1135 AND UPON THE EXPRESS FACTUAL FINDING THAT "AN IN-DEPTH ANALYSIS OF THE SCHOOL BOARD'S PLAN IMPRESSES THIS COURT THAT THE CONTINUED EXISTENCE OF SOME SUBSTANTIALLY PREDOMINANTLY BLACK SCHOOLS IS GENUINELY NONDISCRIMINATORY". 377 F. Supp. at 1132

2. DID THE COURT OF APPEALS ERR IN AFFIRMING THE APPROVAL BY THE DISTRICT COURT OF A SCHOOL DESEGREGATION PLAN UPON AN IN-DEPTH EVALUATION OF THE REALISTIC EFFECTIVENESS OF THE PLAN TAKING INTO ACCOUNT THE PRACTICALITIES OF THE SITUATION? 377 F. Supp. at 1135

THE MONTGOMERY COUNTY SCHOOL SYSTEM

This school system is a unified city-county system including the urban area of the City of Montgomery

as well as the rural areas of the entire county. The system is composed of 54 schools which operate on a six-three-three grade structure. There are 36 elementary schools (grades 1 through 6); 14 junior high schools (grades 7 through 9)[1] (the 14 junior high schools include the facility at Montgomery County High School which was paired in 1970 with the Dunbar facility) and 5 high schools (grades 10 through 12) including the Montgomery County facility in the extreme southern part of the county rural area). There are 35,916 students presently in the system consisting of 17,942 black and 18,874 white students. (March 1974 Report to the District Court) The racial ratio of students is approximately 47.5% black and 52.5% white.[2]

CASE HISTORY OF DILIGENT AND GOOD FAITH IMPLEMENTATION OF GOVERNING CONSTITUTIONAL PRINCIPLES

This school desegregation case was originally commenced on May 11, 1964, as a class action brought by

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[1]There are some combined 1-9 facilities in the system, i.e., Loveless, McIntyre, Georgia Washington, Hayneville Road, Bellingrath and Floyd. They have separate administrations, principals and facilities although they have the same name designation and occupy the same site. The same is true for the Carver complex. The 1-9 facility at Hayneville Road, Georgia Washington, McIntyre and Loveless are consolidated under the Board plan to the 1-6 and 7-9 grade structure.

[2]In 1970 there were 57 schools—38 elementary (Pine Level and Billingslea have been closed); 14 junior high schools and 5 senior high schools. There were approximately 17,175 black students and 22,566 white students in the system in 1970 with the racial ratio of approximately 43% black and 57% white. (1969 Report to the Court)

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black children through their parents. (Original Record, Case No. 25865, p. 1) The United States of America was appointed amicus curiae by order of the District Court dated May 18, 1964, and has served as such during the course of the case. Throughout the course of the progressive desegregation proceedings, every Court reviewing the implementation measures of the board and the case history has complimented the Montgomery County School Board on its efforts toward achieving a unitary system.

The District Court has issued several orders and supplemental directives as desegregation of the system progressed pursuant to the initial order of the Court. The record in these proceedings reflects and is evidence of continuous good faith effort on the part of this Board in accomplishing the necessary but difficult task of achieving a unitary school system in which racial discrimination is eliminated root and branch.

One of the first of the supplemental orders of the District Court was to approve the initial student desegregation for the 1964-65 school year. In this order dated September 5, 1964, in noting such approval, the Court made the following comment at this early and critical stage of the now successfully concluded transition period:

> The Court now specifically finds and concludes that in the case of each of the applicants (black children applying for attendance in predominantly white schools) whether the application was granted or denied, the action of the Montgomery County School authorities constituted a good faith implementation of the governing constitutional principles and a good

faith compliance with the orders of this Court. (Original Record p. 150; 9 Race Rel. L. Rep. 1175)

On May 5, 1965, the District Court stated from the bench:

> Let me say this; that I recognize the problems that exist in this particular school district, and I think the plaintiffs recognize them, and both parties in this lawsuit have, up to this point, demonstrated to me an awareness of their responsibilities not only to their clients, but to the school system, and I want to congratulate and compliment both the plaintiffs and particularly the school board, Montgomery County School Board, for its efforts as demonstrated last fall, in complying with the law as that law was reflected in the Order of this Court. (Original Record p. 445)

On August 27, 1965, the District Court stated:

> From the evidence in this case and from the history of this case as known by the Court, the defendant Board and Superintendent have complied with and are continuing to comply with the applicable law as decreed by this Court on July 31, 1964.
> (Original Record p. 234)

On May 25, 1967, the District Court stated:

> I would like to say this to you here in the presence of the plaintiffs' and the Government lawyers; that I am impressed that the Montgomery County Superintendent of Education and members of the Montgomery County School Board of Education now evidence and have in the past evidenced a desire and intent to operate a school system here in Montgomery

> County as professional educators and not as politicians. This present attitude is demonstrated here at this time; this past conduct on the part of these officials has, without any doubt inured to the benefit of the students regardless of their race, in Montgomery County that seek quality education. And I have observed and I have been impressed that these officials have accomplished this largely through—or this has been accomplished largely through their efforts and without any serious discord or disruption as far as any school is concerned. This, when it is compared with some other similar operations, is a considerable feat, for which this community, in my judgment, owes these school officials their appreciation. It evidences a pattern of professional conduct that other systems could, for the benefit of their students, emulate. (Original Record p. 448-449; 400 F. 2d 1, at p. 3)

On September 5, 1967, the District Court stated from the bench:

> You are dealing here with a school system that you haven't had to take to your appellate courts a single time since you started. It is the only major school system in the state that you haven't had to do it on; that they have done what they have done in good faith, and they have been ahead of most of your other systems in every field. (400 F. 2d 1, at p. 3-4)

Upon conclusion of a hearing on August 15, 1969, the District Court stated from the bench:

> Let's talk about where you are going next year. You all have read these appellate court decisions the same

as I have. The other two large school systems in our state have gone to assignment and zoning and pairing this year by reason of appellate court mandates. You know I am talking about Mobile and Jefferson. This is the only metropolitan large school district in the state that hasn't gone to a zoning and pairing already. *I can say that a part of this is due to the "I think, good faith effort on the part of this board to do what this court felt it necessary to require them or order them to do."* It's due in part to the fact that I think that the court viewed the situation realistically and through it was necessary to go ahead and get started on the job that we had to do. I believe all of this is going to make the terminal year, which is next year insofar as the dual system is concerned, a little less—a little less disrupting and disturbing to your school system than it is on the other larger school systems—and it would probably be on some of your smaller school systems, which is ordered for next year. (Emphasis supplied) (Original Record p. 346-353)

The Court of Appeals on August 1, 1968, in reviewing the District Court faculty directives noted the public recognition given by the District Court to the good faith efforts by this Board. (400 F. 2d 1, at p. 2-3)

The educational experts from the Office of Education acknowledged in their 1970 plan that this Board had made "significant progress" in the desegregation process. (HEW plan, p. 3)

The Supreme Court of the United States, through Mr. Justice Black, in upholding the specific faculty

measures directed by the District Court, concluded its opinion on June 2, 1969 with the following language:

> It is good to be able to decide a case with the feelings we have about this one. The differences between the parties are exceedingly narrow. Respondents, members of the Montgomery County School Board, state clearly in their brief, "These respondents recognize their affirmative responsibility to provide a desegregated, unitary and nonracial school system. These respondents recognize their responsibility to assign teachers without regard to race so that schools throughout the system are not racially identifiable by their faculties. . ." Brief for Respondents 11-12. Petitioners, on the other hand, do not argue for precisely equal ratios in every single school under all circumstances. As the United States, petitioner in No. 798, recognizes in its brief, the District Court's order "is designed as a remedy for past racial assignment . . . We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required." Brief for the United States 13. In short, the Montgomery County school board, and its counsel, assert their purpose to bring about a racially integrated school system as early as practicable in good-faith obedience of this Court's decisions. Both the District Judge and the Court of Appeals have accorded to the parties and their counsel courteous and patient consideration; there is no sign of lack of interest in the cause of either of the courts below. Despite the fact that the individual petitioners in this litigation have with some reason argued that Judge Johnson should have gone farther to protect their rights than he did, we approve his order as he wrote

> it. This, we believe, is the best course we can take in the interest of the petitioners and the public school system of Alabama. *United States v. Montgomery County Board of Education,* 395 U. S. 225, at 236, June 2, 1969.

The Supreme Court of the United States throughout the above opinion, specifically recognized the thorough understanding that the District Court had of the Montgomery County school system. *United States v. Montgomery County Board of Education,* supra.

In the June 29, 1970 affirmance of the District Court's approval of the Board plan, the Court of Appeals significantly stated:

> If more district courts and more school boards had been as sensitive as those here involved to the requirements of the law, the path to the goal of school desegregation in this circuit would have been infinitely smoother than it has been. 429 F. 2d 382, 387 (5 Cir. 1970)

When the 1970 plan was implemented in September of 1970 not as many white children as projected were in attendance at some formerly black schools. The District Court requested an investigation be made by the United States. Upon submission of the investigation as conducted by the United States Department of Justice, Federal Bureau of Investigation, the District Court stated by letter to the United States with copies to all parties:

> From this report, particularly the explanations for the several variances that I noted in my letter as made by the Montgomery County school authorities,

> it appears that the Montgomery County school officials have done and continue to do all that can reasonably be expected of them in order to implement, in good faith, the desegregation plan of this Court. There is no indication that any Montgomery County school officials—and this includes principals and teachers—have done anything concerning the implementation of the order except to make good faith efforts to make the plan that was filed by the Montgomery County School Board and adopted by this Court work effectively. (R. 1938-1941 and Defendant's Exhibit 3 to April 24-25, 1974 hearing)

On August 14, 1972 the United States in responding without objection to the motion of the Board for enrollment changes, stated:

> The student enrollment figures and the stability of the system in the past two years indicate that a unitary school system is being established in Montgomery County.

In the May 22, 1974 order of the District Court the following observation is made:

> This fact [only one appeal filed by school board] is significant in that it underscores the efforts of the Montgomery Board to comply with the law as reflected by the mandates of this Court. Unlike many school boards that opposed desegregation at every step, the Montgomery County Board of Education recognized that it had an affirmative duty to desegregate its school system. As the Fifth Circuit noted on appeal, "good faith conduct on the part of

> any litigant in any court, especially in a court of equity and more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration". (377 F. Supp. at p. 1126 Note 9)

> Second, all the parties to this litigation share the same goal: establishment of a "desegregated unitary and nonracial school system". Every court that has reviewed the record of this litigation has observed that the differences between the parties have been unusually small. Moreover, the Montgomery County School Board has been repeatedly complimented for its good faith efforts to comply with the requirements of the law. It is worthy of pride that the ten-year history of this case has been characterized throughout by cooperation from all the participants. (377 F. Supp. at 1127-1128)

In the May, 1974 opinion the District Court additionally and specifically stated:

> Since the implementation of the 1970 plan, the evidence in this case reflects that the school board has attempted in good faith to ensure its effective operation.
> (District Court Opinion—377 F. Supp. at p. 1131)

On May 22, 1974 the District Court very significantly finds from the evidence and concludes:

> The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation". (377 F. Supp. at 1123)

On April 11, 1975 the Court of Appeals observed in affirming the order of the District Court, which the Petitioners here seek to review:

> "We take note of the history of this litigation as reflected by the opinion of the district court, this court and the Supreme Court, cited in the district court's Opinion" 511 F. 2d 1374.

The single dissent of the Court of Appeals significantly concedes:

> "I am confident that our respected, scholarly, and courageous trial judge did not hesitate to apply the law correctly as he saw it to the facts before him in Montgomery". 511 F. 2d at 1387.

STATEMENT OF THE CASE

Procedural Background of Current Litigation

During the school years 1970-71 and 1971-72, the Montgomery County School system operated pursuant to a Court approved desegregation plan which was prepared essentially by government educational experts with some minor changes and refinements (377 F. Supp. at 1226)

On Appeal, the Fifth Circuit affirmed the District Court's decision to implement this plan. *Carr vs. Montgomery County Board of Education,* 429 F. 2d 382 (5 Cir.) 1970.

The 1970 plan included proposals to close certain schools, to change transportation routes, to pair several schools and to establish attendance areas. (377 F. Supp. 1226) These techniques resulted in actual student desegregation in every school in the Montgomery System

except one which the Court of Appeals found to be a facility located so deep in the heart of a black residential area as not to be practicable to desegregate. (377 F. Supp. at 1131 and 429 F. 2d at 386) The 1970 plan also included, as noted by the Court of Appeals "imaginative use of the transportation system utilized to bring students from non-zoned rural areas [heavily predominantly black and historically transported] to schools within the City of Montgomery." (429 F. 2d at 384)

The District Court in the May 1974 opinion found that since 1970, the board "worked with the plaintiffs and the United States in an effort to keep its plan updated, and changes in attendance zones and school facilities have been proposed and approved by this Court". (377 F. Supp. at 1127)

The background of the current litigation commenced in August of 1972 with the filing by the School Board in the District Court of a motion seeking leave of the Court to make certain enrollment changes from those proposed and approved by order of the Court made and entered on February 25, 1970.

The August 1972 proposed changes involve the construction of new school facilities and resulted in further desegregation of the system as a whole through rerouting of some peripheral non-zoned county transportation.

Shortly after the filing of the motion for enrollment changes, representatives of a predominantly white apartment complex located in the "non-zoned peripheral area" petitioned to intervene in the case upon the basis that students from the predominantly white

area were proposed by the motion of the Board to be transported to a heavily desegregated elementary school rather than to less integrated facilities which the petitioners there claimed were substantially closer to their homes.[3] The District Court summarily denied this petition for intervention.

On August 14, 1972 the United States filed a response to the Board motion for enrollment changes which stated that the changes proposed did not conflict with the prior orders of the Court. The United States noted that previous enrollment variations were not due to discriminatory Board conduct and specifically observed that: "the student enrollment figures and the stability of the system for the past two years indicate that a unitary school system is being established in Montgomery County."[4]

On August 22, 1972 the District Court approved the enrollment changes and reserved ruling on the construction proposals pending the filing of 1972-73 enrollment and transportation reports.

After the Board filed the enrollment and transportation reports, as ordered, the District Court on July 3, 1973 approved and authorized immediate commence-

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[3]These white petitioners objected to being transported to Forest Avenue, then 40% black rather than to Bear, then 13% black, Dannelly, then 10% black or to Floyd, then 25% black.

[4]Defendant's Exhibits 2 and 3 in the April 24, 1974 District Court hearing show that after an investigation into the reason some white children did not attend formerly black schools in September 1970 was not due to any type of Board action. The District Court found from the investigation by Department of Justice that school officials acted in good faith to do everything possible to implement plan.

ment of the new construction as set forth in the August 1972 motion. This approval and authorization was without objection from any party.

On August 23, 1973 a joint motion of the parties was filed requesting additional enrollment changes to further desegregate the system as a whole. Specifically this joint motion requested the court to permit the predominantly black Billingslea School to be closed and the students assigned to a predominantly white facility and for predominantly white students to be reassigned to the previously black Houston Hill facility from Goodwyn, a predominantly white school.

The August 1973 joint motion set forth the agreement of the parties to continue their study toward the elimination of such one race schools as may be required by *Swann v. Charlotte-Mecklenberg*, 402 U. S. 1, 91 S. Ct. 1267. 28 L. Ed. 2d 554 (1970) giving special attention to achieving a desegregation solution for the Carver complex and the Booker T. Washington Junior High School facility. This joint motion set forth the time table for the filing of the plaintiff's plan and the Board's plan which were presented to the District Court during five days of evidentiary hearings during April of 1974.

On May 22, 1974 the District Court approved the board plan as last modified. In the May 1974 order the District Court found and explained that the plan submitted by the petitioners here—plaintiffs and plaintiffs intervenors—were solely to achieve racial balance in the schools, were unduly and unnecessarily disruptive and that they would not achieve as much

realistic and stable desegregation as would the board plan.

The District Court found that the board plan would result in the effective desegregation "of the system as a whole" and that the Court was "convinced that considered as a part of a complete system, under the facts of this case" the Board plan is "constitutionally acceptable". (377 F. Supp. at 1137-1138.)

The Court of Appeals affirmed on April 11, 1975 and denied Rehearing and Rehearing En Banc on June 27, 1975, *Carr v. Montgomery County Board of Education,* 511 F. 2d 1374 (5 Cir. 1975)

BACKGROUND OF PLAN SUBMISSIONS

During the Fall of 1973 the Board considered and evaluated every possible desegregation technique and measure (377 F. Supp. at 1131) in evaluating the Montgomery system as a whole. In accord with the order of the Court approving the joint motion of the parties, special attention was given to achieving a desegregation solution for the Carver complex and for Booker T. Washington Junior High School. In addition the relation of each school in the system to the entire system was considered. Predominantly one race schools were thoroughly studied and analyzed to determine whether they could reasonably be desegregated in an effective, workable and practical manner. Consideration was given to transportation increases; hazards and difficulties in exchanges of students and desegregation results. The location and circumstances surrounding predominantly one race schools was care-

fully analyzed from every point of view.[5] This analysis was presented to the District Court in the form of oral testimony and by written responses of the School Board which were filed in the District Court to suggestions of the United States, and by Responses of Board to plaintiffs' plan. During the Fall of 1973 the United States made numerous suggestions which were carefully studied and in most instances implemented by the Board.[6]

The plan of the Board which was approved by the District Court reflects many months of study and analysis, including the considerations set forth above.

The District Court allowed the plaintiff-intervenors to file a plan when the petitioners-plaintiffs did not comply with the Court ordered filing schedule. (Feb-

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[5]Detailed explanations were given covering each of the remaining predominantly one race schools as to location, factual surrounding circumstances and desegregation techniques considered.

[6]The United States suggested rerouting transportation of white Lanier students to Carver and zoning white area of Town & Country Estates into Carver; the assignment of white students from Jeff Davis to Lanier to maintain "*stable desegregation*" and a "workable plan"; white Baldwin students to Carver Junior and some black children from Carver to Floyd, Cloverdale or Goodwyn and some black students from Carver to Bellingrath; reassignment of black students from Bellingrath peripheral zone to Floyd, Cloverdale or Goodwyn, Later the United States recommended a higher white percentage in Carver Senior High and that whites be transported from Chisholm to Houston Hill (formerly black). The United States suggested that black elementary children from the closed Chilton and converted Goode Street facilities be assigned to "predominantly white schools in the eastern section of the City; and from Booker Washington Junior High to predominantly white schools. The many suggestions of the United States are incorporated in the Court approved plan along with many other effective desegregation measures.

ruary 15, 1974 Order and Memorandum Opinion of District Court) The plaintiff petitioners thereafter did file their plan.

EVIDENTIARY PROCEEDINGS IN THE DISTRICT COURT

Following extensive pretrial depositions and discovery[7] the hearings in the District Court below consumed five full days of trial. Each party was afforded an opportunity to present and to fully explain all aspects of each respective desegregation plan. The case of the plaintiff-petitioners lasted one day; the plaintiff-intervenor-petitioners and Board each utilized two days of trial presentation.

Prior to trial the parties each presented responses to plans submitted by the other parties. (The United States filed on January 15, 1974 their "suggestions" in lieu of a plan.)

The Board filed thorough and detailed responses to these suggestions as well as to the plans of the plaintiff-petitioners and of the plaintiff-intervenor-petitioners. In addition the Board filed a thorough and detailed response to a plan submitted and later withdrawn by the United States on behalf of Maxwell Air Force Base. The Maxwell plan called for a grade restructuring of

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[7]Deposition of William Silas Garrett, Superintendent; Dr. Gordon Foster and Dr. Larry Winecoff; Motion to Produce filed by plaintiff-intervenors; interrogatories propounded by plaintiff-intervenors and by United States on behalf of Maxwell Air Force Base; student dot map prepared by all parties in cooperation pursuant to order of District Court and upon information compiled by the Board.

all senior high schools with each facility consisting of one grade for all students in the system.

Following trial, extensive post trial briefs were filed by all parties.

THE PLANS BEFORE THE COURT

Board plan approved by District Court:

The Board plan as approved by the District Court starts with the 1970 plan and utilizes in addition to the desegregation techniques therein involved, many additional transportation route changes involving both black and white students, zone changes, the closing of physically inferior schools, the consolidation of schools and the construction of new schools. The present plan continues the pairings and the utilization of nonzoned rural transportation as set forth in the 1970 plan.[8]

The Board plan reassigns approximately 4,000 white and 5,000 black children. (377 F. Supp. at 1132) There will be 2401 white children transported to schools which are predominantly black or would be predominantly black without the white transportation involved. As in 1970 and in accord with the 1970 approved plan black students are transported from the heavily predominantly black rural peripheral areas to suburban schools which would be predominantly white without such black transportation.

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[8]The 1970 plan in addition closed 2 predominantly white schools —Pike Road and Cloverdale elementary; one formerly white school, Pintlala Junior High and 4 predominantly black schools, Hall, McDavid, Booker Washington Sr. High and Georgia Washington Senior High. Since this time one formerly white school (Pine Level) and one predominantly black school (Billingslea) have been closed.

There will be a total of 11,477 students transported under the Board plan—6659 black and 4818 white. Of the number of black transported students, 4158 are from the predominantly black county peripheral area and are transported to formerly white schools on the edge of Montgomery. These students live in areas which have always been transported. An additional 972 black students are transported from predominantly black rural areas to schools in the southern part of the county which also have always been transported schools (Catoma, predominantly white; Pintlala, formerly white and Dunbar Elementary which was paired in 1970 with the Montgomery County High, formerly white facility). The remainder of the black transported students, i.e., 1479 are transported within established zones and in accord with the provisions of the Board plan. This number compares with the 2401 white students who are transported to predominantly black schools or to schools which would be predominantly black without such white transportation.

The conversion of the virtually all-black Georgia Washington School (1-9 facility) to a desegregated junior high complex and the construction of the two new elementary facilities will further desegregation in 14 schools throughout the system. This is accomplished by zone adjustment and through further utilization of the peripheral nonzoned county transportation.

The Carver complex is effectively desegregated with white children being transported to the junior and senior high schools resulting very substantial actual desegregation.

White children are transported to the Houston Hill facility resulting in a white enrollment of over 50%.[9]

Under the Board plan, desegregated extra-curricular activities are expanded and integrated inter-school participation through joint seminars and educational clinics are developed. (377 F. Supp. at 1131)

As found by the District Court, all of the students in the Montgomery system under the Board plan will attend a substantially desegregated school the majority of their school careers. Over 80% of the black children in the system will attend a substantially desegregated school for at least six grades out of twelve. (377 F. Supp. at 1132).[10]

Under the Board plan over 85% of the students in the system will attend a heavily desegregated school during all twelve years and every child in the system, black and white, will attend a substantially desegregated senior high school. One hundred percent of the black children in the system will attend a substantially desegregated high school facility. (377 F. Supp. at

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[9]The Board originally proposed substantial lower white enrollment of approximately 40% at Carver Senior High and Houston Hill. However, the United States objected to this on the basis that the Board must achieve a desegregated plan which realistically promises to work.

[10]Only those students assigned to McIntyre Junior High are excepted from this figure (with the exception of Montgomery County High which was not included in any of the plans which were before the Court) and the District Court specifically found that the McIntyre facility "is impossible to effectively desegregate in a stable and workable manner". The students assigned to McIntyre will attend a desegregated senior high school. It is significant that under the plaintiff-intervenors' plan A, McIntyre Junior High is left substantially black at 65%.

1132.) Every formerly all white school in the Montgomery school system will, under the Board's plan, be substantially desegregated. Several formerly all white schools will now be predominantly black. Further, several formerly all black schools will become predominantly white. (377 F. Supp. at 1132) All of the black children from the rural county areas who are transported to city schools will attend a predominantly or majority white facility and under the plan no white child is transported past a majority black school to a majority white school.

The petitioners attack the Court approved plan on two main grounds: (1) the remaining one race schools and (2) the assignment of more blacks than whites to accomplish desegregation.

Remaining one race schools: Mr. Silas Garrett, the Superintendent of Schools for the Montgomery system, explained in testimony below, each remaining one race school as to the location of the facility and practicalities of desegregation. Mr. Garrett detailed the transportation hazards and difficulties involved in attempting to desegregate these facilities. Mr. Garrett testified that the Board considered assigning additional white students to each of these facilities. From the Superintendent's testimony; as was reflected in the written response of the Board filed in the District Court, each of these schools is located deep in the heart of a black residential area and each is several miles from any appreciable number of white residents.[11] The Dis-

[11]It is highly significant that the annual per pupil expenditures in the overwhelming majority of these schools substantially exceeds the system wide average.

trict Court found that all white students within a reasonable distance of these schools, are, in fact, assigned thereto. (311 F. Supp. at 1132.) The additional pairings, clusterings and satellite zone techniques would not produce effective, realistic and workable desegregation. (311 F. Supp. at 1132.) Students would be assigned and exchanged distances of from 8 to 10 to 15 miles each way. Mr. Garrett testified in detail and specifically as to each of these remaining one race schools and that they could not be desegregated in a workable and practical manner.[12]

When the Montgomery system is evaluated as a whole (there are 48 schools in the system under the approved plan); the record amply supports the finding of the District Court that the remaining predominantly one race schools are (1) genuinely non-discriminatory and (2) cannot be effectively and realistically desegregated in a practical and workable manner. In this regard the trial court specifically held:

> An indepth analysis of the school board's plan impresses this court that the continued existence of some substantially predominantly black schools is genuinely non-discriminatory. 311 F. Supp. at 1132.
>
> This Court desires to emphasize that the remaining predominantly black schools in this school system under the board's plan cannot be effectively desegregated in a practical and workable manner. 377 F.

[12]The Superintendent also testified that the school system is on a fixed budget with no legislative authority to raise revenue. That the Board is without funds to finance a satellite zoning transportation plan and that from an educational standpoint "travel time is wasted time" "every dollar you spend for transportation comes out of instruction".

Supp. at 1135.
The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation".. 311 F. Supp. at 1135.

Of the ten elementary schools listed by the District Court as continuing to remain substantially predominantly black[13] three are formerly all white facillities and were majority white in 1969 immediately prior to implementation of the 1970 plan.[14] Two of these predominantly black elementary schools have had stable though not numerically substantial desegregation since 1970.[15]

The black elementary students in the remaiming substantially predominantly black elementary schools will comprise 14.3% of the entire elementary enrollment of the system or approximately 28% of the black elementary enrollment. These black students will attend a desegregated school in other portions of their school careers with the vast majority going on to a desegregated junior high school[16] and all going to a desegre-

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[13]The District Court finds that each of these is "located deep in black residential areas" and "the white students residing in these areas are assigned to the nearest of these schools. While this has to some extent desegrated practically all of these schools, no ratio has been accomplished that satisfies the plaintiffs and plaintiff-intervenors". (377 F. Supp. 1132)

[14]Davis 74 blacks and 651 whites in 1969; Pintlala 70 blacks and 188 whites in 1969 and Bellinger Hill 42 blacks and 151 whites in 1969.

[15]Paterson 54 whites projected under 1970 plan; 35 in attendance in September, 1970; 29 in attendance in September 1972 and 32 in

gated high school.[17] The students assigned to Daisy Lawrence, Booker T. Washington Elementary; Carver Elementary; Fews, and Loveless which the Court found could not be effectively desegregated in a practical, workable and realistic manner, (377 F. Supp. at 1132) comprise 7.3% of the total school population of 36,376 projected by the 1974-75 plan and as previously noted 100% of these children will attend a heavily desegregated senior high school.

McIntyre Junior High School which the Court also found could not be effectively further desegregated in a practical, workable and realistic manner, (377 F. Supp. at 1132) comprises 2.2% of the total school population and its students will attend the desegregated Carver Senior High. The District Court carefuliy stated:

> This court desires to emphasize that the remaining predominantly black schools in this school system under the Board's plan cannot be effectively desegregated in a practical and workable manner. 377 F. Supp. at 1135.

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attendance in March 1974. Hayneville Road 150 whites projected under 1970 plan; 58 in attendance in September, 1970; 42 in attendance in September of 1972; 29 in attendance March, 1974.

[16]Hayneville Road to desegregated Goodwyn (66% white) and Floyd (65% white); Fews to desegregated Carver Junior High (61% white); Booker T. Washington to desegregated Capitol Heights (62% white) and Cloverdale (67% white); Paterson to desegregated Houston Hill (65% white); Daisy Lawrence to desegregated Carver Junior High (61% white).

[17]Lee 63% white; Lanier 57% white; Jeff Davis 62% white and Carver 61% white. (Actual 1974 enrollment reflects approximately 52% white)

> In each instance this court has examined and re-examined the evidence and has determined that these predominantly black schools exist and continue to exist without any discriminatory Board conduct. The system as a whole will be desegregated. (Emphasis supplied) 377 F. Supp. at 1135.

Assignment of black and white students to accomplish desegregation: As to the second thrust of petitioners' attack of the Court approved plan, it has been previously noted that 4000 white children are reassigned with 2286 white children being transported to predominantly black schools or to schools which would be predominantly black without this white transportation. In addition 350 white children are transported from what is presently the Jefferson Davis zone to the Lanier zone without which assignments Lanier would be predominantly black. This is in accord with the suggestion of the United States to afford workable desegregation in Lanier. These white children are transported from the peripheral area to further the desegregation of the system.

Transportation is provided primarily in the Montgomery system to students in the rural county areas. Since the 1970 H. E. W. plan called for the children in these nonzoned county peripheral areas to be assigned to suburban white schools, some more black children than whites logically will be transported. It was without dispute that the county is substantially predominantly black.

Of the 3,157 black elementary children transported 2,206 of these are from the predominantly black county rural areas which have always been transported.

This leaves only 950 black students transported in zoned areas which compare with the 1,308 white elementary students who will be transported under the Board plan.

The plaintiffs' plan: The plaintiffs' plan was prepared by Dr. Gordon Foster, a professor at the University of Miami. Dr. Foster testified in the District Court that his assignment was to remove the racial identifiability of the schools in the Montgomery system. In determining racial identifiability of the school, the sole factor considered by the plaintiffs was the racial composition of the student enrollment of the particular school. ". . . no consideration whatsoever to the other indicia in school desegregation cases such as faculty, transportation, facilities and extracurricular activities". (377 F. Supp. at 1141.)

At the elementary and junior high school level, Dr. Foster determined that 48.5% of the total elementary and junior high school enrollment was black. From this percentage figure, 48.5%, he used a 15% variation to determine the racial identifiability of the elementary and junior high schools of the system; that is, any elementary school or junior high school with an enrollment of less than 33.5% black was racially identifiable as white; if the enrollment was more than 63.5% black the school is racially identifiable as black. (311 F. Supp. at 1128-1129.)

At the high school level, Dr. Foster determined that 45.5% of the total high school enrollment was black. From this percentage figure, 45.5%, he again used a 15% variation to determine the racial identifiability of schools in this system. This is to say any high school

with an enrollment of less than 30.5% black is racially identifiable as white. If the enrollment is more than 60.5% black, the school is racially identifiable as black. The plaintiffs used clustering and pairing extensively in grade structures 1-2, 1-3, 1-4, 3-6, 4-6, 5-6 and 1-6. (311 F. Supp. at 1128-1129).

In testimony it was determined that the plaintiffs actually paired and clustered *schools* as opposed to areas with very little apparent regard to proximity. This is made apparent by the "adjustments" the plaintiffs performed prior to pairings or clusterings, i.e., black children were sent from the Carver Elementary Zone to Hayneville Road and from the Hayneville Road Zone to Cloverdale prior to the three-way clustering of Hayneville Road, Crump and Bear. It is noted that Hayneville Road is on the extreme western edge of Montgomery, with Bear and Crump being on the extreme esatern side of town. After the "adjustments" which the plaintiffs made by simply moving children from Carver to Hayneville Road and from Hayneville Road to Cloverdale, a ratio of 50.4% was achieved *in each of these schools.* By such "adjustments" prior to clusterings or pairings, the plaintiffs in their original proposal, were able to effect a balance of within 1/10th of 1% of the exact racial percentage in each of the schools paired or clustered with two exceptions.[18] The exact racial balance varies by 2/10ths of 1% in these exceptions. (311 F. Supp. at 1128) As noted, the schools paired or clustered range in grade structures 1-2, 1-3, 1-4, 3-6, 4-6 and 5-6 and eleven elementary schools under the plaintiffs' plan are left 1-6. Under

[18]Goode Street 46% black paired with Morningview 45.8% black and Bellinger Hill, 47.8% black paired with Forest Avenue, 47.6% black.

the plaintiffs' plan 7,555 or 43% of the total number of elementary students would be reassigned and according to Dr. Foster, some 5,204 students would be transported for the first time under his elementary plan. The plaintiffs reassign a total of 12,618 or 36% of the total enrollment in the Montgomery system, and require additional transportation for 7,196 students over present transportation or a 64.3% increase. The plaintiffs closed two school facilities, i.e., Booker Washington Junior High and Chilton and restructure the grades in twenty-five others. Under the plaintiffs plan 47.6% of the elementary children in the system would be transported with 60% of the junior high and 38% of senior high school students being transported. (311 F. Supp. at 1128-1129).

Dr. Foster explained that his shifts and adjustments prior to pairing were "bookkeeping procedures" and that the zone lines were not changed prior to such adjustments. Therefore under the plaintiffs' clustering and pairing proposals, zones would turn into a hodgepodge of confusion. The percentages between schools after such shifting and transferring are almost equal with the distance between schools not being considered. It is apparent that shifting, reassignment and transportation for racial balance, was, in fact, the objective of the plaintiff's plan.[19] The plans submitted by the plain-

[19]Dr. Foster testified that in assignments for racial balance, "You would deliberately set about to have each school come out absolutely even". It is apparent from the adjustments made prior to the pairings of schools as opposed to consideration of distances and zones that this approach was, in fact, used in developing the plaintiffs' plan. It is also significant that the plaintiffs have paired racially unidentifiable schools according to Dr. Foster "in one case, and maybe two."

tiffs and the testimony of Dr. Foster amply support the finding of the District Court that:

> It is evident, and this Court finds, that fracturization of grade structure and the pairing and clustering of schools in the Montgomery school system, as proposed by the plaintiffs, *is for the sole purpose of obtaining a strict racial balance in each elementary school involved.* (Emphasis supplied) 377 F. Supp. at 1129.

With the tremendous number of students to be reassigned and transported under the plaintiffs' plan, with no regard being given for the time and distance to and from the schools, it is apparent that the District Court was justified in concluding that the plan of the plaintiffs would not effectively desegregate the Montgomery County school system in a workable and practical manner. (377 F. Supp. at 1129).

Plaintiff-Intervenors' Plan: The plaintiff-intervenors' plan as prepared by Dr. Larry Winecoff originally consisted of three separate proposals, i.e., Plan A. Plan A Alternate and Plan B. The varying approaches taken in these three plans constitute a significant indication of the comparable desegregation results by all possible desegregation techniques and approaches. The plaintiff-intervenors' plan was analyzed in depth before the District Court. Dr. Winecoff uses the same type tolerance factors as does Dr. Foster in determining whether the racial ratio of each school is "acceptable". However Dr. Winecoff used 10 to 15 percent as his tolerance in determining racial identifiability. (311 F. Supp. at 1130).

Although all of Dr. Winecoff's proposals start with geographic zoning with interzone transportation imposed in some instances, Dr. Winecoff testified that in determining major geographical areas, he made an effort to balance the black and white population. An example of his balancing approach is seen in his explanation of the Flowers and Daisy Lawrence exchange of students:

> Flowers and Daisy Lawrence—picked up all the students that were furtherest from Flowers for transportation and didn't get quite enough white students, so we picked up a few more from this area, also going to Daisy Lawrence. The same thing with this area; we didn't pick up quite enough blacks out of this zone. We are getting very close to Daisy Lawrence, so we used these students who were in the Flowers zone but would require transportation to Flowers.

The "zones" in many instances run from county line to county line—the central zone for grades one through three runs from the Alabama River on the west side of Montgomery to the eastern most line of the city; the zones in many instances are ten to twelve miles long and at places therein are only three or four blocks wide.[20] (311 F. Supp. at 1130). Plaintiff-intervenors' Plan A includes arbitrarily selected transportation pockets in non-contiguous zones which in at least three instances actually cover or include the school which children are presently attending, which children living adjacent thereto are presently attend-

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[20]Dr. Winecoff described these zones in testimony as "somewhat compact single geographical zones."

ing, but from which facility they would be transported great distances under the plaintiff-intervenors' Plan A.

In Plan A plaintiff-intervenors' divide the system into a 1-3; 4-6; 7-9 and 10-12 grade structure. This structure did not fit in some instances and a grade structure of 1-6 is left in one school.

Plan B which the plaintiff-intervenors "abandoned" shows still another approach using a 1-3, 4-7, 8-10 and 11-12 grade structure. Plan B left 16 racially identifiable schools according to Dr. Foster's tolerances.[21]

Plaintiff-intervenors' Plan A leaves Bellinger Hill 70% black; Peterson 80% black; Fews 65% black; McIntyre 85% black and McMillan 84% black.

Plaintiff-intervenors' Plan A Alternate leaves Loveless 100% black; Carver Elementary 85% black; McMillan 84% black; Bellinger Hill 70% black; Peterson 81% black; Fews 65% black; Paterson 70% black and Daisy Lawrence 97% black.

To accomplish the questionable degree of desegregation[22] set forth above, Dr. Winecoff under Plan A which he testified to be preferable to his other, would transport approximately 16,584 students or 45.45% of the overall student body of the system. The plaintiff-intervenors' transportation includes approximately 2,000 elementary children who would be transported for the first time under their Plan A. (311 F. Supp. at

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[21]These include Hayneville Road, 98% black; Carver 98% black; McMillan 78% black; Loveless 98% black; Dalraida 0% black; Dannelly 8% black, Daisy Lawrence 99% black.

[22]Dr. Winecoff testified that there were no educational advantages afforded by his plan that were not included in the Board plan.

1130) Under Plan A 20,988 students would be reassigned or 57.6% of the overall total enrollment including the reassignment of 12,644 elementary children and/or 68.4% of the overall elementary students in the system; and 5,475 or 54.3% of the junior high together with 2,869 or 35.7% of the senior high school students (311 F. Supp. at 1130).

Dr. Winecoff under his Plan A closes six schools[23] and restructures grades in thirty-three additional schools.[24] Dr. Winecoff calculated his distances and transportation difficulties "as the crow flies" using arcs of 2 and 2½ miles on the map. The 1-3 zones under Plan A do not correspond with the overall 4-6 zones for individual schools and entirely new zones are drawn for grades 7-9. No two areas feed the same elementary and junior high schools. Thus children are reassigned to different localities and with different children at grades 1-3; 1-6; 7-9 and 10-12. An example of the continuing problem that will exist through the years under Plan A is seen in the assignment of students from the Montgomery East section of Montgomery. Here under plaintiff-intervenors' Plan A children in grades 1-3 are transported to the Georgia Washington facility located approximately ten miles out in the county. These same

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[23]Booker Washington Elementary; Booker Washington Junior; (Carver Elementary is increased to 1,067 students which Dr. Winecoff testified is administratively too large for an elementary facility); Carver Junior High; Chilton; Highland Avenue Elementary and Madison Park.

[24]One of these restructurings proposes to make Baldwin a 4-6 facility instead of a junior high school. Dr. Winecoff testified that when the four story structure at Baldwin is considered, that he would not "want to send primary students to a four story structure and largely for fire regulation reasons".

children in grades 4-6 are brought back to the city and assigned to the Eastern By-Pass School and then sent back to Georgia Washington for grades 7-9 to be returned to the city to attend Jeff Davis for grades 10-12. The 1-3 and 4-6 arrangement is not a pairing but an entirely new zoning of the city with arbitrarily selected interzone transportation superimposed in the elementary grades of 1-3, so that the rural percentages would work out.

We respectfully submit that the District Court was amply justified in the factual finding:

> "The evidence reflects, and this Court now finds, that the plan proposed by the plaintiff-intervenors for the elementary, junior high, and senior high schools in the Montgomery school system is designed to achieve a racial balance in these schools. (311 F. Supp. at 1130)

REASONS FOR DISALLOWANCE OF WRIT

ARGUMENT

The decision which the petitioners seek to review establishes the keen awareness of the District Court of the controlling constitutional principles in school desegregation as enumerated by this Court in *Swann*, *Green*, *Davis* and *Brown I* and *Brown II*.[25-29] The District Court Judge below has lived with this case for

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[25]*Swann v. Charlotte-Mecklenberg*, 402 U. S. 1
[26]*Green v. County Board of Education*, 391 U. S. 430
[27]*Davis v. Board of School Commissioners Mobile County*, 402 U. S. 33 (1971)
[28]*Brown v. Board of Education*, 347 U. S. 483
[29]*Brown v. Board of Education*, 344 U. S. 141

many years and has an exceptional awareness of the facts surrounding the Montgomery school system. The Supreme Court has specifically recognized Judge Johnson's thorough familiarity with the Montgomery school system. *United States v. Montgomery County Board of Education,* 395 U. S. 225, 23 L. Ed 2d 263, 89 S. Ct. 1670. The District Court prior to writing the order here sought to be reviewed, gave petitioner thorough and exhaustive evidentiary hearings and painstaking consideration. Voluminous evidence was offered and considered. We have attempted in this brief to detail the pretrial, evidentiary and post trial proceedings afforded by the District Court.

This case is indeed a classic example of a district court being in the best position to determine whether a school system has carried the burden of satisfying the court that the racial composition of some schools in the system is not the result of present or past discriminatory action on the part of a school board. *Swann v. Charlotte-Mecklenberg,* 402 U. S. 1, 28 L. Ed 2d 554, 91 S. Ct. 1267. It is noted here that the factual finding of "genuinely nondiscriminatory" and the finding that some schools could not be desegregated in a practical, reasonable or realistic manner were subsequently accepted by the Court of Appeals, which has had prior occasion to review the record of the Montgomery system.

The district court decision establishes that all types of desegregation techniques were in fact considered in this case. When the lack of overall and systemwide desegregation achieved by such techniques is compared with the increased transportation costs and with the impracticable and unworkable nature of the proposed

measures, it is apparent that the trial court very correctly found that: "the evidence in this case reflects that the plans proposed by the plaintiffs and plaintiff-intervenors will accomplish very little stable, long term desegregation in this system" (377 F. Supp. at 1135) and "would place an excessive and unnecessarily heavy administrative burden on the school system." (377 F. Supp. at 1129)

The Board plan places over 85% of all of the students in this system in desegregated schools. All children will attend a desegregated senior high school and over 80% of the black children in the system will be in a desegregated school for a majority of their school careers. Every formerly all white school in the Montgomery system will, under the Board's plan, be substantially desegregated. Several formerly all white schools will now be predominantly black. Further, several formerly all black schools will become predominantly white schools. (377 F. Supp. at 1139).

The plaintiffs and the plaintiff-intervenors leave all black schools remaining under their plans and leave many racially identifiable schools under the "tolerances" of their experts.[30]

All possible and conceivable desegregation techniques were presented and considered in the District Court. The plaintiff-petitioners presented a plan and a hastily drawn revision thereof which included pair-

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[30]It is significant that Dr. Winecoff testified that these "tolerances" would vary in their application from one school district to another depending on racial composition of the various communities. The arbitrary nature of such mathematical tools is apparent.

ings, clusterings and three and four-way shuttling of students between schools. The United States on behalf of Maxwell Air Force Base presented and then withdrew a plan which would have placed one high school grade in each of three school facilities and then presented and withdrew a plan which would have assigned all students in the ninth, tenth and eleventh grades to each of four school facilities. Dr. Winecoff presented on behalf of plaintiff-intervenor-petitioners' Plan A, Plan A Alternate, and a Plan B, which was abandoned as undesirable. By virtue of these plans the District Court was called upon to consider grade restructuring of every conceivable combination, satellite zoning, elongated zoning, compact zoning, pairing, clusterings, shuttle busing, busing and even the staggering of the opening of school times. The Court directed each party to submit detailed critiques and responses to the plans submitted; five days of evidentiary hearings were conducted. After extensive post trial briefs the Court concluded:

> The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation." (377 F. Supp. at p. 1135).

The many, many proposals, techniques, shuttlings and shiftings presented by the plaintiffs and the plaintiff-intervenors and by the United States when compared with the results achieved thereby, give strong credence and amply support the findings of the District Court that some remaining one race schools in this

system just cannot be desegregated in a practical, workable and realistic manner.

THE DISTRICT COURT PROPERLY FOUND, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THAT THE BOARD PLAN ACHIEVES THE GREATEST POSSIBLE DEGREE OF ACTUAL DESEGREGATION.

The District Court below in analyzing and *considering* the many desegregation plans and techniques presented, concluded under the facts and circumstances, that the Board's plan would accomplish the greatest degree of actual and workable desegregation. The District Court carefully follows the constitutional mandates set forth in *Swann,* supra, *Davis,* supra, *Green,* supra, and *Brown,* supra.

The petitioners in brief seemingly fail to grasp the significance of the District Court order. The court below does not give blanket approval to the continued existence of all predominantly one-race schools in all circumstances and under all factual situations. The District Court does not say that a proximity or neighborhood plan at the elementary level will accomplish a unitary system in all circumstances and under all factual situations. The District Court does say that a unitary system may exist even though some genuinely nondiscriminatory one-race schools remain and even though some elementary school assignments are to a neighborhood school or to one in proximity to the home of elementary children.

The Court below does find that the Montgomery Board met the burden of proof in justifying and explaining the continued existence of one-race schools.

(*Swann v. Charlotte-Mecklenberg*, supra) and the fact that elementary children are in large measure assigned the school nearest their homes shall not in and of itself under the facts of this case render the plan unconstitutional. The Court finds that school compositions are, in fact, genuinely nondiscriminatory under the Montgomery Board plan and finds that under the facts and circumstances of this case that some schools cannot be further desegregated in an effective, realistic, practical or workable manner. The District Court considered the other options available and concluded that the plans presented by the plaintiff-petitioners and by the plaintiff-intervenor-petitioners are unrealistic and create unnecessarily heavy administrative burdens and disruption. The plans of plaintiff-petitioners and plaintiff-intervenor-petitioners are found not to accomplish effective and workable desegregation and, in fact, leave many schools which are racially identifiable under their "tolerance" standards. It is obvious from the plans of petitioners that they are designed solely to achieve a racial balance.[31] This is proven by the way Dr. Foster

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[31]The plan of the petitioner obviously is designed to produce an exact mathematical balance by whatever means are necessary and regardless of how many noncontiguous areas are involved. Such is constitutionally unwarranted and impermissible; in *Winston-Salem Forsyth County Board of Education v. Scott*, 404 U. S. 1221, 31 L. Ed 2d 441, 92 S. Ct. 1236 Mr. Chief Justice Burger specifically held:

". . . the District Court on reconsideration following the remand seems to have thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in *Swann* suggests a possible confusion on this point. I do not attempt to construe that language, but simply recite it verbatim: *'The Constitutional Command to desegregate schools does not mean*

shifted students from one school to another prior to pairing or clustering such schools with two or three others to achieve an almost exact racial balance between the schools so paired or clustered. Dr. Winecoff uses satellite zoning from one side of town to the other with elongated zones extending from the Alabama River on the West to practically the county line on the East. Even with this Dr. Winecoff leaves many "racially identifiable schools" according to his standards.[32] The findings of the District Court amply establish that the Court was correct in concluding that no workable or practical desegregation would be realized from the plaintiff-petitioners or plaintiff-intervenor-petitioners' plans and that the disruption occasioned by the implementation of such plans would be excessively disruptive.

A. THE DISTRICT COURT PROPERLY FOUND REMAINING ONE-RACE SCHOOLS TO BE GENUINELY NONDISCRIMINATORY.

Since the District Court opinon, the Supreme Court has again written to one-race schools. In *Milliken v. Bradley*, 418 U. S. 717, 41 L. Ed 2d 1069, 94 S. Ct. 3112; the Court through Mr. Justice Burger observed:

> In Swann, for example, we were dealing with a large but single independent school system and a unanimous court noted: 'Where the proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that

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that every school in every community must always reflect the racial composition of the school system as a whole', 402 U. S. at 24, 28 L. Ed 2d at 571." (31 L. Ed 2d at 448)

[32]See 377 F. Supp. 1129-1130.

> are all or predominantly of one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory." 402 U. S. at 26, 28 L. Ed 2d 554. See also Keyes, supra, 413 U. S. at 208, 37 L. Ed 2d 548, *However, the use of significant racial imbalances in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy.* Emphasis supplied (41 L. Ed 2d at p. 1089, Note 19).

It is apparent that the facts and circumstances surrounding school assignment in each school system must be independently evalued in consideration of the existing circumstances and systemwide options available. This is seen from the cases which have discussed the continued existence of one-race schools. *Northcross v. Board of Education, Memphis,* 489 F. 2d 15 (4 Cir. 1973) Cert. Den. 416 U. S. 962 (1974).

There was a finding of *nondiscriminatory student assignment* in the Montgomery case which is detailed and factual. The District Court found that the Board under facts and circumstances of the case, has accomplished the *greatest degree of actual and workable desegregation.* The Court of Appeals in the 1970 appeal of this case, emphasized:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. *The matter must be assessed in light of the circumstances present and the options available in each instance.* Green v. County School Board of New Kent County, 1968,

391 U. S. 430, 439, 88 S. Ct. 1689, 1691, 20 L. Ed 2d 716. (Carr v. Montgomery County Board of Education, 429 F. 2d 383, 385-386.)

B. THE DISTRICT COURT PROPERLY FOUND THAT REMAINING ONE RACE SCHOOLS UNDER THE BOARD PLAN COULD NOT BE DESEGREGATED IN A PRACTICAL AND WORKABLE MANNER.

A careful analysis of the position of the Petitioners reveals that they actually urge the removal of "racial identifiability" (which is but another way of stating the achievement of racial balance), regardless of workability, practicality, administrative feasibility or hardship. The Petitioners take the position that as long as buses can be bought they should be judicially required without regard to budget, transportation costs and regardless of the resultant increased distance to and from schools and the resultant educational impingement. (Appendix page A to this brief carefully analyzes the comparative transportation costs occasioned by the Petitioners' plans that were presented to the District Court). The Superintendent, who the District Court found to be an experienced administrator, testified that all transportation expenditures had to come from instruction and that the Montgomery system is on a fixed budget without means to increase revenue. Appendix B to this brief analyzes and compares the disruptive features of plans of the plaintiff-petitioners and plaintiff-intervenor-petitioners. For example and as found by the District Court, the plaintiffs' plan would reassign 12,685 students or 36% of the total school system requiring transportation for 17,971 children or 49.4% of the school system. Similarly plaintiff-inter-

venor-petitioners' plan would require reassignment of 20,988 students or 57.6% of the total school system requiring transportation for 16,587 children or 45.5% of the school system. (Appendix B to this brief).

The extreme measures proposed by petitioners to eliminate some of the remaining one race schools were detailed to the District Court. In many instances students, who would be bused for the first time would have to be transported eight to ten to twelve miles each way, tremendously multiplying travel time and creating transportation difficulties and hazards. The results achieved by such measures are not realistic or practical; for example and in one of many, many instances, the plaintiff-intervenor-petitioners project at 65% black enrollment at the McIntyre Junior High School which under their plan would be at the expense of the 61% white enrollment which the Board projects at the formerly all black Carver Junior High.

Justices White, Douglas, Brennan and Marshall, while dissenting in *Milliken v. Bradley*, supra, significantly made the following observation and analysis:

> Viewed in this light, remedies calling for school zoning, pairing and pupil assignment become more and more suspect as they require that school children spend more and more time in buses going to and from school and that more and more educational dollars be diverted to transportation systems. Manifestly, these considerations are of immediate and urgent concern when the issue is the desegregation of a school system where residential patterns are predominantly segregated and the respective areas occupied by blacks and whites are heavily populated

> and geographically extensive. *Thus, if one postulates a metropolitan system covering a significantly large area, with the population evenly divided between whites and Negroes and with the races occupying identifiable residential areas, there will be very real practical limits on the extent to which racial identifiable schools can be eliminated within the school district....* (Emphasis added) 41 L. Ed 2d at 1102).

The School Superintendent in the instant case made just this point in testimony when he stated that since elementary school enrollment is approximately 50% black and 50% white and since to some significant extent, the blacks live on one side of the city and whites on the other, to "remove the racial identifiability of each school" would of practical necessity require massive cross town busing and exchange of students. This was also found to be the case by the District Court.

We respectfully submit that the transportation difficulties as explained by the Board during testimony at trial and as outlined in Appendices A and B to this brief, are real, vital, immediate and constitutionally acceptable considerations in determining the "very real practical limits" on what can reasonably and legally be required of a school board. On May 17, 1974 the Court of Appeals for the Fifth Circuit in *Arvizu v. Waco Independent School District,* 495 F. 2d 499, through Judge Gewin, recognized:

> Transportation hazards and difficulties are, under *Swann,* justifiable reasons for noninclusion of certain grades in a school desegregation plan. See Ellis v. Board of Instruction of Orange County, 465 F. 2d 878 (5 Cir. 1972); Lee v. City of Troy Board of

Education, 432 F. 2d 819 (5 Cir. 1970) (495 F. 2d at p. 504 n. 9.)

The comparative desegregation achieved at both the elementary and junior high level under the plans which were before the Courts below give substance and validity to the District Court's finding that remaining one race schools in this system under the Board plan could not be effectively desegregated in a practical and workable manner. (Not in a manner that promises realistically to work) *Green v. New Kent County*, 391 U. S. 430, 20 L. Ed 2d 716, 88 S. Ct. 1689.

The Supreme Court in *Davis v. Board of School Commissioners*, 402 U. S. 33, 28 L. Ed 2d 577, 91 S. Ct. 1289, specifically noted that "actual" desegregation should be achieved *"taking into account the practicalities of the situation"* (91 S. Ct. at 1292).

In construing the language in regard to practicalities, the Fourth Circuit in the case of *Thompson v. School Board of City of Newport News, Virginia*, 465 F. 2d 83, (4th Cir. 1972) specifically stated:

> It seems implicit from this mandate that "practicalities" do represent a factor to be weighted by the District Court in passing on a plan of desegregation; and that *cross-busing is not to be automatically ordered*, irrespective of all considerations of distance, time required for travel, *traffic hazards, and age and maturity* of students involved. (Emphasis added) (465 F. 2d at 88).

The Supreme Court in *Swann v. Charlotte-Mecklenberg*, 402 U. S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 554,

noted that the age of children is a critical factor in considering a busing proposal:

> It hardly needs stating that the limits on time or travel will vary with many factors, but probably *with none more than the age of the students.* (Emphasis added) (28 L. Ed 2d 554)

In *Northcross v. Board of Education of Memphis,* 489 F. 2d 15, Cert. Den., 416 U. S. 962 (1974), the Sixth Circuit supra, with approval, recognized the necessity of considering practicabilities in a desegregation case and *shed significant light as to what would be judicially approved in the area of remaining one-race schools. This Court denied certiorari in the Northcross case which left 19 all black elementary schools, 2 all black high schools and 2 all black junior high schools.* In *Northcross* as in Montgomery, there are no remaining all white schools. The Court in *Northcross* specifically held:

> The practical considerations set forth in Swann which influenced the District Court's decision in this case are as follows: First, the limited usefulness of racial quota ratios; secondly, the necessity of tolerating some one-race schools because minority groups concentrate in urban areas; thirdly, the logical problems inherent in remedial alteration of attendance zones; and lastly, the limitations on travel that must be considered when transportation remedies are employed. (489 F. 2d at 17)

The District Court considered specific and detailed reasons as to exactly why it was not practical, realistic or feasible to attempt to assign additional white children to the schools remaining predominantly black un-

der the Board's proposal.[33] White children have been previously assigned to all of these facilities except one.[34] The District Court, on prior occasions, recognized that the white children previously assigned did not attend because of some factor other than discriminatory Board conduct. (See p. 9-10 of this brief)

There will be no all-white schools at all under the Board's plan and no one-race high school with a single remaining one-race junior high. The Board and the District Court considered the techniques of clustering, pairing, and cross-town busing. The desegregation results achieved by such techniques were not of a substantial nature and did not justify the tremendous disruption involved.

The attack made in the brief of Petitioners on the District Court order concerning "white flight" is misplaced and attempts to interject an artificial issue. Petitioners here attempt actually to set up a "straw man". Actually the "White Flight Phenomenon" and as seen from the record, was injected into the case by the Petitioners and by the United States.

In the response of the *plaintiff-petitioners* to the plan of the plaintiff-intervenor-petitioners, the following statement is made:

> History has taught us in this case that the assignment of a substantial minority of whites to inter-city, traditionally black schools, creates the risk of white

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[33]Significantly, under Dr. Winecoff's plan 2 of these schools are closed and 5 are left "racially identifiable" under his "tolerance" standards.

[34]Loveless Elementary as discussed in the prior order of the Court of Appeals, 429 F. 2d 382, 386.

exodus to peripheral areas with lower black enrollment.

In the government's "suggestions" filed on January 15, 1974, their term "white flight" is used as follows:

> While the "white flight phenomenon" is clearly not grounds for failing to order desegregation of a school system, *Cooper v. Aaron,* 358 U. S. 1 (1958); *Brown v. Board of Education,* 349 U. S. 294 (1955), courts have properly considered its impact in seeking to achieve a stable, workable desegregation plan for a school system. See e. g. 483 *United States v. Board of School Commissioners,* 483 F. 2d 1406 (7th Cir. 1973). In view of the past segregation experience at the Carver High School, the nature and size of the educational park at Carver, and the duty to achieve a desegregation plan that "promises to work" (Green v. County School Board, 391, U. S. 430 (1968), the United States believes any desegregation plan for this area should follow the guidelines set forth below (suggestions to assign additional whites to Carver).

Again the *United States* in responding to the plan of the Board states:

> As we pointed out in our earlier submission, courts have properly considered the impact of "white flight" in seeking to achieve a stable, workable desegregation plan for a school system. *U. S. v. Board of Commissioners,* 483, F. 2d 1406 (7 Cir. 1973)

The plaintiff-intervenor-petitioners use the term "white flight" in their responses to the plan submitted

by Maxwell Air Force Base and specifically state the following:

> The white parent, who is already dissatisfied with his child attending an integrated school will therefore have an additional and we might say, a more valid reason, for sending his child to a private school.

The District Court found that the Board plan would produce the greatest actual desegregation and would result in a unitary school system. This was in accord with all governing constitutional principles in school desegregation cases.

CONCLUSION

For the above and foregoing reason, we respectfully submit that the petition for a writ of certiorari is due to be denied.

Respectfully submitted,

Vaughan Hill Robison
Joseph D. Phelps

Attorneys for Respondents

October 25, 1975

TRANSPORTATION COSTS OF EACH PLAN
COMPARED WITH CURRENT TRANSPORTATION COST

1973-1974 Transportation Cost 11,176 Students Currently transported times $83.93, cost per pupil	$ 937,990.67[1]	
1974-1975 Transportation Cost Projected under Board's 3/29/74 Plan 11,477 Students transported times $83.93	963,264.61[2]	
Increased Transportation Costs of Board Plan		$ 25,273.94
1974-1975 Transportation Cost under Plaintiff's Plan		
17,971 Students Transported times $83.93	1,503,773.80	
85 Additional Buses at $10,000.00 each to transport 6,741 Additional Students	850,000.00	
Additional Plant Facilities and Additional Personnel for Increased Transportation	763,000.00	
Total:	$3,116,773.80	
Increased Transportation Cost of Plaintiff's Plan		$2,178,783.13

Footnotes appear on Page 52

APPENDIX A

PAGES BOUN

16,587 Students Transported times $83.93	$1,392,146.90	
69 Additional Buses at $10,000.00 each to Transport 5,411 additional Students	690,000.00	
Additional plant facilities and additional personnel for increased transportation	763,000.00	
	$2,845,146.90	
Increased transportation cost of Plaintiff-Intervenor's Plan A		$1,907,156.23
1974-1975 Transportation Cost Projected Under Plaintiff-Intervenor's Plan A 1-3 Alternative		
15,503 Students transported times $83.93	$1,301,166.70	
55 Additional buses at $10,000.00 each to transport 4,327 additional Students	550,000.00	
Additional plant facilities and additional personnel for increased transportation	763,000.00	
Total:	$2,614,166.70	
Increased transportation cost of Plaintiff-Intervenor's Plan A		$1,676,176.03

1. The budget of current revenues, 1973-74 (Government's Exhibit 4 to Garrett's deposition of 4/12/74) shows $19,070,921.81 total receipts. Current transportation costs constitutes 4.990 of the total receipts.

2. Based on current receipts of $19,070,921.81 projected transportation costs of $963,264.61 under the Board's Plan constitutes 5% of the total receipts.

3. Based on current receipts projected transportation costs of $3,116,773.80 under the plaintiff's plan constitutes 16.390 of the total receipts.

4. Based on current receipts projected transportation costs of $2,845,146.90 under plaintiff-intervenor's plan A constitutes 14.90 of the total receipts.

5. Based on current receipts projected transportation costs of $2,614.166.70 under plaintiff-intervenor's plan A. Alt. alternate constitutes 13.7% of the total receipts.

PAGES BOUND VERTICALLY

	District Court Approved Plan of Board	Plaintiff's Plan	Plaintiff-Intervenors Plan A	Plaintiff-Intervenors Plat A. Alt.
Percent of students to attend substantially desegregated schools majority of school career	100 %	100 %	100 %	100 %
Number of completely all-black schools remaining	0	1	0	1
Percent of all pupils in systems in heavily integrated schools	85 %	97 %	94 %	90 %
Percent of pupils in system to attend heavily integrated senior high school	95.2%	95.2%	95.2%	95.2%
Number of schools closed	3	2	6	6
Schools in which grades are restructured	4	25	33	33
Total number of students and percentage of system reassigned	9,008 - 25 %	12,685 - 36 %	20,988 - 57.6%	20,882 - 57.4%

COMPARATIVE ANALYSIS OF PLANS

APPENDIX B

	District Court Approved Plan of Board	Plaintiff's Plan	Plaintiff-Intervenors Plan A	Plaintiff-Intervenors Plat A. Alt.
A. Number and percentage of system of elementary children reassigned	3,208 - 17.4%	7,555 - 43 %	12,644 - 68.4%	12,538 - 67.9%
B. Number and percentage of junior high children reassigned	3,723 - 38 %	3,493 - 36 %	5,475 - 54.3%	5,475 - 54.3%
C. Number and percentage of system senior high students reassigned	2,077 - 25.2%	1,637 - 26 %	2,869 - 35.7%	2,869 - 35.7%
Total number and percentage of students to be transported	11,477 - 31.5%	17,917 - 49.4%	16,587 - 45.5%	15,503 - 42.6%
A. Number and percentage of elementary students to be transported	4,465 - 24 %	8,791 - 47.6%	3,405 (GRADES 1-3) 3,932 (GRADES 4-6) 7,337 - 40 %	2,321 (GRADES 1-3) 3,932 (GRADES 4-6) 6,253 - 34 %
B. Number and percentage of junior high students to be transported	4,156 - 41 %	6,035 - 60 %	5,157 - 51 %	5,157 - 51 %
C. Number and percentage of senior high students to be transported	2,856 - 36 %	3,091 - 38.4%	4,093 - 51 %	4,093 - 51 %